UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

IN RE: JAMAL JBARA

DEBTOR.

CHAPTER 7

BANKR. NO. 1-09-48496-dem

JOSE BORGES
PLAINTIFF,

v.

JAMAL JBARA,
DEFENDANT.

ADVERSARY NO. 1-10-01004-dem

ANSWER TO COMPLAINT

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U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF
NEW YORK

Pro-se debtor and Defendant, Jamal Jbara, hereby admits, denies or otherwise answers Plaintiff's Complaint to Determine Dischargeabilty of Certain Debt (hereinafter referred as "Complaint") filed against him as follows:

1. Defendant specifically admits the allegations contained in paragraph one of the Complaints, but denies the date the initial complaint was filed.
2 Defendant specifically denies liability for any and all the causes of action listed in paragraph two.
3. Defendant specifically denies the factual allegations contained in paragraph four. Defendant never lied or misled the Plaintiff about his immigration status or about the type of motion he agreed to do. It is uncontroverted that Plaintiff's order of removal (deportation) occurred two years before the Defendant was ever involved with the case. The Plaintiff was fully aware of his outstanding order of removal (formerly known as deportation), which was of concern to him. During the Defendant's fist

meeting with the Plaintiff, the Plaintiff stated that he failed to appear at his deportation hearing because he was afraid to go unrepresented for fear of being deported. The Plaintiff never alleged to the Defendant that he was instructed or advised not to appear at his removal hearing. The Plaintiff also never stated that he had been told that his deportation order had been vacated nor had the Defendant ever stated that the order had been vacated. The outstanding order of removal had been discussed with the Defendant when the parties met to prepare for Plaintiff's immigration interview and it was also discussed moments before the Plaintiff was called in for his interview. Despite Defendant's repeated instructions to the contrary, Plaintiff lied to the immigration officer when asked whether he had ever been ordered deported. Defendant never misrepresented himself as an employee of an immigration firm or any organization for that matter. Defendant's representation was ethical and proper. In fact, a Disciplinary Bar Committee investigation determined that Defendant's representation was proper and dismissed Plaintiff's complaint (Exhibit "A"). Defendant also denies knowledge and information sufficient to form a belief as to the accuracy of the allegations concerning the other defendants.

4. Defendant admits the allegations contained in paragraph four the Complaint.
5. Paragraph five of the Complaint requires no response as it pertains to legal conclusions.
6. Defendant specifically denies liability for any and all the causes of action listed in paragraph six.
7. Defendant denies each and every allegation of the Complaint not specifically admitted herein.
8. Defendant specifically pleads the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

9. Any claims for negligence, breach of contract, and legal malpractice are dischargeable in bankruptcy.

SECOND AFFIRMATIVE DEFENSE

10. Any claims based upon alleged fraud was negated and waived by the Plaintiff in a motion to reopen filed by Plaintiff's current counsel with the immigration court in 2003. The plaintiff unequivocally stated in that motion that "It is not alleged that Mr. Jbara himself engaged in *any* type of fraud." (see page 16 of Exhibit "B")

THIRD AFFIRMATIVE DEFENSE

11. Any claims based on fraud and alleged violation of New York Judiciary Law § 487 are precluded for failing to state with particularity all the essential facts forming the basis for the inference of fraud or deceit.

FOURTH AFFIRMATIVE DEFENSE

12. Plaintiff's legal malpractice claim should be dismissed because the prevailing law at the time of the alleged malpractice was that the Plaintiff had 180 days within which to file a motion to reopen, which included claims based on fraud. It is undisputed that the Defendant was hired by the Plaintiff after the 180 day deadline had lapsed. The Plaintiff was ordered removed on February 3, 1998. Defendant was hired in 2000 to represent Plaintiff at his adjustment of status interview and then later to reopen Plaintiff's removal order. After researching the issue, the Defendant explained to the Plaintiff that the statute of limitations had lapsed and that his only recourse was to request that the Office of District Counsel for the then Immigration and Naturalization Service join Plaintiff in a motion seeking to reopen his deportation order. It is undisputed that the Defendant did file such motion but without success. Plaintiff then retained current counsel who filed a Motion to reopen Plaintiff's

deportation case based upon ineffective assistance of counsel, which alleged fraudulent conduct on the part of the other defendants. That motion specifically states that "It is not alleged that Mr. Jbara himself engaged in *any* type of fraud." (See page 16 of Exhibit "B") The motion was denied by the Immigration Court as untimely. Plaintiff then appealed to the Board of Immigration Appeals which, relying on precedent, agreed with the Immigration Court that the motion was untimely and dismissed the appeal. Plaintiff then appealed to the Third Circuit, which in a "case of first impression", rendered a precedential decision ruling that the 180 day statute of limitations for filing a motion to reopen could be tolled based on allegations of fraud. The Third Circuit remanded the case to the Board of Immigration Appeals "to determine whether fraud was perpetuated on Borges by Placeres and/or Ivan causing the *in abstentia* order of removal at issue". The Court raised no issues of fraud on the part of this Defendant.

FIFTH AFFIRMATIVE DEFENSE

13. All of the claims in the Complaint, such as, negligence, breach of contract, fraud, breach of fiduciary duty, etc., should be dismissed because they are nothing more than redundant restatements of the legal malpractice claim. i.e., that Defendant failed to file a Motion to Reopen Plaintiff's deportation order.

SIXTH AFFIRMATIVE DEFENSE

14. All the causes of action listed in the Complaint failed to state a claim upon which relief can be granted. In particular, none of the causes of actions in the Complaint state how the alleged actions of the Defendant caused injury to the Plaintiff.

SEVENTH AFFIRMATIVE DEFENSE

15. Any claims for intentional infliction of emotional distress, breach of fiduciary duty, breach of New York Law § 487 and fraud are time barred by the applicable statute of limitations.

EIGHTH AFFIRMATIVE DEFENSE

16. Any claims based upon allegations of fraud are essentially tortious in nature and are time barred by the applicable statute of limitations.

NINTH AFFIRMATIVE DEFENSE

17. Any claim based upon alleged breach of contract by the Defendant is precluded by the statute of frauds.

TENTH AFFIRMATIVE DEFENSE

18. The Complaint brought forth by the Plaintiff is frivolous and the demand for damages is arbitrary and capricious.

ELEVENTH AFFIRMATIVE DEFENSE

19. Plaintiff's claims for damages have no basis in fact.

TWELVETH AFFIRMATIVE DEFENSE

20. Plaintiff's claim must be dismissed for unclean hands and abuse of process.

THIRTEENTH AFFIRMATIVE DEFENSE

21. Plaintiff's complaint is grossly defective in that it fails to comply with Federal Rules 7008 and 7010 (Exhibit "C"). The complaint fails to contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge. The complaint also failed to plead each averment of the claims in separate numbered paragraphs. Essentially, on the last day within which to file a complaint, Plaintiff's counsel slapped a summary of the civil complaint filed seven years ago to a set of exhibits. This conduct flagrantly disregards

both Federal Rules and Defendant's procedural rights. Plaintiff is not a *pro se* litigant unaware of the Federal Rules of pleading and therefore deserving of special consideration. Plaintiff's counsel is an experienced federal court litigator whose woefully inadequate filing should not be accepted as a complaint and should be dismissed with prejudice.

22. The Defendant reserves the right to assert additional objections, including objections to jurisdiction, venue, sufficiency of service, failure to state facts upon which relief could be granted, and failure to join party after the filing of this answer.

WHEREFORE, Defendant prays that the Complaint filed herein against him be dismissed with prejudice; for his costs herein expended; and for any and all other just and proper relief.

Dated: March 19, 2010

By: ______________
Jamal Jbara
Pro Se Defendant

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

IN RE: JAMAL JBARA — CHAPTER 7

BANKR. NO. 1-09-48496-dem

DEBTOR.

JOSE BORGES

PLAINTIFF,

ADVERSARY NO. 1-10-01004-dem

v.

JAMAL JBARA,

DEFENDANT.

CERTIFICATE OF SERVICE

The undersigned certifies that on March 19, 2010 a copy of the annexed papers was served by depositing same, enclosed in a properly addressed postage-paid envelope, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, upon:

- Paul O'Dwyer, Attorney for Plaintiff
  134 West 26th Street, Suite 902
  New York, NY 10001

- Lori Lapin Jones, Trustee
  98 Cutter Mill Road, Suite 201 North
  Great Neck, NY 11021

- Diana G. Adams, U.S. Trustee
  Office of the United States Trustee
  271 Cadman Plaza East, Suite 4529
  Brooklyn, NY 11201

March 19, 2010

Jamal Jbara
Pro Se Defendant

EXHIBIT LIST

EXHIBIT A Copy of Findings from the Departmental Disciplinary Committee, Supreme Court, Appellate Division, First Appellate Department

EXHIBIT B Copy of Plaintiff's Motion To Reopen with the Immigration Court

EXHIBIT C Copy of Plaintiff's Complaint To Determine Dischargeability Of Certain Debt

80000 SERIES
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DEPARTMENTAL DISCIPLINARY COMMITTEE
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May 22, 2003

PERSONAL AND CONFIDENTIAL

Jamal Jbara, Esq.
1133 Broadway
Suite 908
New York, NY 10010

Re: Complaint of Jose Borges
Docket No. 2003.0074

Dear Mr. Jbara:

Following a careful investigation of the allegations in the complaint filed by Jose Borges against you, and after review by a member of the Departmental Disciplinary Committee, we have determined to take no further action and closed the file on this matter.

Very truly yours,

Thomas J. Cahill

Thomas J. Cahill

TJC:adp/P:JGW/A:ANB

D-PR/R(F471/T518)

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
970 Broad Street, Room 1135
Newark, NJ 07102

NOTICE OF MOTION

In the Matter of
Jose Borges,

File Number: A 73 591 940

Respondent.

RESPONDENT'S MOTION TO RE-OPEN

Respondent JOSE BORGES, by and through his undersigned counsel, hereby moves this Court for the following relief:

1. An Order vacating the *In Abstentia* Order of Deportation dated February 3, 1998; and
2. An Order allowing Respondent to adjust his status to that of permanent resident; and
3. Such other and further relief as to this Court shall seem just and necessary.

Dated: New York, New York
January 7, 2003

By:

Paul O'Dwyer, Esq,.
134 West 26 ~~Street, Ste. 9~~02
New York, New York 10001
(646) 230-7444

03 JAN 27 11:19

To:
Office of the District Counsel
970 Broad Street, 11th Floor
Newark NJ

TABLE OF CONTENTS

INDEX TO EXHIBITS 3

INTRODUCTION 4

PROCEDURAL BACKGROUND AND HISTORY 4

LEGAL ARGUMENT 9

1. **Ineffective Assistance of Counsel and "Extraordinary Circumstances"** 9

2. **The Tolling of the 180-day Period Because of the Fraud of Mr. Borges' Prior Counsel.** 14

CONCLUSION 17

INDEX TO EXHIBITS

A. Affidavit of Mr. Jose Borges in support of his Motion to Reopen;

B. Copy of Notice to Appear dated July 16, 1997;

C. Copy of receipts as proof of payment of legal fees made by Mr. Borges to his attorneys;

D. Copy of Motion to Change Venue filed on January 29, 1998;

E. Copy of *in abstentia* Order dated February 3, 1998, ordering Mr. Borges removed to Venezuela.

F. Copy of I-130 and I-485 and filing fee receipt filed with INS on March 2, 1998;

G. Copy of Form I-166 received by Mr. Borges in April, 1998;

H. Copy of "Motion to Reopen to Reconsider" filed on April 25, 1998;

I. Copy of Decision and Order dated June 10, 1998, denying the "Motion to Reopen to Reconsider";

J. Copy of stamp in Mr. Borges' passport after Adjustment of Status interview;

K. Copy of proposed Joint Motion to Reopen, dated September 2000, filed with the Office of the District Counsel but never filed with the Immigration Court;

L. Copy of complaint by Mr. Borges served on his former attorneys and filed with the Disciplinary Committee of the Supreme Court of the State of New York, First Judicial Department (Affidavit of Service attached)

INTRODUCTION

Respondent Jose Borges was ordered removed *in abstentia* from the US to Venezuela on February 3, 1998. Respondent hereby moves this Court for an order vacating the *in abstentia* order as well as for an Order adjusting his status to that of permanent resident.

The basis for this Motion to Reopen is the fraudulent conduct and ineffective assistance of Mr. Borges' prior counsel, who failed to advise the court in 1998 that Mr. Borges was the beneficiary of an I-130, filed by his U.S. citizen wife. The ineffective assistance of Mr. Borges' prior counsel constitutes "extraordinary circumstances" within the meaning of 8 C.F.R. § 3.23(b)(4), while the fraudulent conduct of his attorneys equitably tolls the 180-day limit for filing such a motion.

PROCEDURAL BACKGROUND AND HISTORY

Mr. Borges is a Venezuelan citizen who entered the US in June 1996 on a B-2 visa. An affidavit from Mr. Borges detailing the facts and circumstances of his case is annexed hereto as Exhibit A. Removal proceedings were commenced in July 1997 by way of a Notice to Appear alleging an illegal overstay (Exhibit B). After a number of court appearances, in January 1998, Mr. Borges hired an attorney, Mr. Alfred Placeres, to represent him in his immigration proceedings, which included an adjustment of status petition based on Mr. Borges' proposed marriage to his then-girlfriend, Ms. Jolie LaMarca, a U.S. citizen. Mr. Placeres apparently practiced through a company called Entra America, located at 1133 Broadway, Ste. 908, New York NY 10010, but he used a P.O. Box address (P.O. Box 7806, F.D.R. Station, New York NY 10150) on correspondence and forms.[1] There was no written retainer agreement, and in fact Mr. Borges never met Mr. Placeres, but instead

[1] According to the New York State Office of Court Administration, the only Alfred Placeres licensed to practice in New York maintains an office at 2710 Broadway, New York NY 10025.

dealt with a paralegal named Adela Ivan at Entra America, who claimed to be an employee of Mr. Placeres (Exhibit A, ¶ 2, 3). Neither Adela Ivan nor Entra America are accredited representatives within the meaning of 8 C.F.R. § 292.1 or § 292.2, and were therefore not authorized to appear on Mr. Borges' behalf at either EOIR or INS. Mr. Borges paid $50 to Ms. Ivan on January 10, $100 on January 12, and $800 on January 31, 1998, for legal representation by Mr. Placeres (Exhibit C).

On January 20, 1998, a Motion was filed, allegedly by Mr. Placeres, with the Immigration Court requesting a change in venue of the removal proceedings from New Jersey to New York (Exhibit D). The Motion is both factually incorrect (Mr. Borges was never detained and therefore never "bonded out") and legally insufficient (see Local Rules 4.B). Mr. Borges appeared in court without his attorney on January 27, 1998. The Motion for a change in venue was denied, and Mr. Borges was directed to appear in court again on February 3, 1998.

Immediately after the Immigration Court appearance, Mr. Borges contacted the Entra America office - the only means he had to speak with his attorney. He informed Ms. Ivan of what had happened, and she subsequently informed him that she had spoken with Mr. Placeres, whose advice was not to return to court because he would be ordered deported, whereas if he didn't return to court he would be able to adjust status because of his marriage, and thus he could not be deported (Exhibit A, ¶ 6).

On January 29, 1998, Mr. Borges married Ms. LaMarca and they remain married. On February 2, 1998, Mr. Borges advanced to Entra America by check the cost of the filing fees for an I-130 and an I-485, with the understanding that they would be filed that day (Mr. Borges also paid Entra America $800 on the same date to reschedule his immigration court case) (Exhibit C). Ms. Ivan repeatedly and explicitly told Mr. Borges that, according to Mr. Placeres, there was "no problem" with the Immigration Court proceeding because he was married to a U.S. citizen Exhibit A, ¶ 6, 8).

Following his attorney's advice, Mr. Borges didn't appear in court on February 3, 1998, and an *in abstentia* order of deportation was entered against him (Exhibit E). On March 2, 1998, Mr. Placeres and/or Entra America filed an I-485 and an I-130 with the INS at 26 Federal Plaza on Mr. Borges' behalf (Exhibit F).

In early April, 1998, Mr. Borges received Form I-166 from INS (Exhibit G). He contacted Entra America immediately and was informed, through Ms. Ivan, that Mr. Placeres would vacate the Order of Deportation, and that everything would be fine (Exhibit A, ¶ 8). On April 25, 1998, Mr. Placeres (allegedly) filed a "Motion to Re-open to Reconsider" the order of deportation (Exhibit H). That Motion provided no basis on which the Court could grant the relief sought, and, most bizarrely, failed to mention that a petition for adjustment of status had been filed. Had it done so, the outcome of the Motion would undoubtedly have been different. That Motion was denied by Decision and Order dated June 10, 1998 (Exhibit I). A copy of this Decision and Order was mailed to Mr. Placeres' P.O. Box address but not to Mr. Borges, and no appeal was ever taken.

Mr. Borges was never informed that the Motion to Reopen had been denied. He assumed it had been granted and also assumed the order of deportation had been vacated (Exhibit A, ¶ 9). Subsequently, Mr. Borges was advised that another attorney, Mr. Jamal Jbara would be assuming responsibility for the case, and he had no further contact with either Mr. Ivan or Mr. Placeres (Exhibit A, ¶ 9).

On February 2, 2000, Mr. Borges and his wife appeared for an adjustment of status interview with INS at 26 Federal Plaza, accompanied by Mr. Jbara. Mr. Jbara advised Mr. Borges that there was no need to refer to his prior immigration court case during the adjustment interview, because the order of deportation had been vacated. Mr. Borges accepted this advice. INS remained ignorant, apparently, of the Order of Deportation, as the petitions were approved, Mr. Borges' fingerprints cleared and his passport was stamped accordingly. Mr. Borges had no reason to believe that there was an outstanding Order of Deportation against him, as he had just been approved for permanent residence by the INS (Exhibit A, ¶ 9).

In April 2000, Mr. Borges and his wife needed to travel to Venezuela because Mr. Borges' mother was gravely ill. He called Mr. Jbara to confirm that he would be able to re-enter the US (as he had not yet received his conditional green card) with just a stamp in his passport. Mr. Jbara advised him that he would not be able to re-enter the US, and that he should return to 26 Federal Plaza. Mr. Borges did so, along with Mr. Jbara, on May 20, 2000, and the stamp on his passport was voided "without prejudice" and replaced with "pending sec. 245" (Exhibit J). This was the first time that Mr. Borges became aware that there was still an outstanding Order of Deportation (Exhibit A, ¶ 9).

Mr. Jbara advised Mr. Borges that he would immediately file a motion to re-open the deportation order (Exhibit A, ¶ 10), and Mr. Borges paid him $250 and $500 in May and June, 2000, respectively to do so (Exhibit C). A proposed joint motion (Exhibit K) was submitted to the Office of the District Counsel on or about September 18, 2000; however, no motion was ever filed with the Immigration Court. The proposed Motion makes no reference to the earlier proceedings, nor does it address the obvious ineffectiveness of Mr. Borges' prior counsel. At this time, the Order of Deportation remains in effect, as does the approved I-130. Mr. Borges was not aware until recently that the Motion to Reopen had not been filed (Exhibit A, ¶ 10), although he has made constant and consistent efforts to keep in contact with his attorneys.

In mid June, 2002, the undersigned attorney retrieved Mr. Borges' file from Mr. Jbara's office, and reviewed same. After my initial review of the file and meeting with Mr. Borges, it was my opinion that he did not have any avenue of relief to seek to re-open the Order of Deportation. In September, 2002, I discovered that Mr. Placeres had never been registered with the New York State Office of Court Administration at either the PO Box address used on the G-28 or at the Entra America office. After further discussion with Mr. Borges, I became aware that he had never met with Mr. Placeres and that Mr. Placeres had never appeared in Immigration Court on Mr. Borges' behalf. Further investigation revealed that Mr. Borges believed that a Motion to Re-open his deportation order was pending.

Since January 1998, when he first hired an attorney, Mr. Borges made consistent efforts to resolve his immigration case, by hiring attorneys to represent him, by taking their advice, by keeping in constant contact with them, and by seeking out the advice of other attorneys when he believed that the assistance of his current attorneys was incorrect and/or insufficient (Exhibit A, ¶ 12). The fact that Mr. Borges' made such persistent efforts to reach his attorneys and to constantly seek their advise on his immigration case is compelling evidence that Mr. Borges' acted in accordance with their counsel at all times. Mr. Borges' cell phone records (which can be produced for inspection, if necessary) show that he made repeated phone calls to Mr. Jbara's office over the last few years, and the annexed receipts show that he paid them $2,280 over a period of two and one-half years for legal advice and services. As he states in his Affidavit, he is in a worse position for having hired them than if he had represented himself at all times.

LEGAL ARGUMENT

Motions to reopen *in adstentia* removal proceedings are governed by 8 C.F.R. § 323(b)(4)(ii). A motion to reopen an *in abstentia* order of removal must be filed within180 days of the final order of removal, and the movant must show "extraordinary circumstances" for his failure to appear, id.. The only a motion to reopen can be filed outside of the 180-day limit is if this statutory limit is tolled for any reason. In the matter at bar, Mr. Borges shows extraordinary circumstances for his failure to appear (ineffective assistance of counsel) and also shows that the 180-day limit for filing a motion to re-open has been tolled because of the ongoing fraud of his prior attorneys. Mr. Borges has complied with the Lozada requirements for a claim of ineffective assistance of counsel. In addition, Mr. Borges is eligible for adjustment of status in front of the immigration judge, and requests that his status be adjusted to that of permanent resident in accordance with 8 C.F.R. § 240.11.

1. **Ineffective Assistance of Counsel and "Extraordinary Circumstances"**

In Matter of Grijalva, 21 I. & N. Dec. 472, Int. Dec. 3284 (BIA 1996) the Board Of Immigration Appeals held (in the context of INA Section 242(B)(f)(2)) that ineffective assistance of counsel constitutes exceptional circumstances to allow a motion to reopen an *in abstentia* order of deportation, *id.*, 880, 881.

Mr. Borges' attorney's conduct was the reason that he did not appear in Immigration Court on February 3, 1998. The record shows that Mr. Borges appeared for each of his other Immigration Court appearances. It was not until Mr. Placeres and/or Entra America began to give him legal advice that Mr. Borges missed his Immigration Court date, which led to the *in abstentia* Order of Removal being entered. If Mr. Placeres had appeared at any of the Immigration Court hearings held after he filed a Notice of Appearance with the Immigration Court, he could have advised the court on January 28 of Mr. Borges' pending marriage, or on February 3, 1998 that he was married and was about to file an Adjustment of Status Petition. Indeed, had Mr. Placeres done his job, and filed the I-13- and I-485 before the February 3, 1998 court appearance, as Mr. Borges hired him to do and believed he had done, Mr. Placeres could have made an application to the Immigration Court either for an adjournment of the removal proceeding because of the pending applications, or for a dismissal without prejudice of the removal proceedings because of the Adjustment of Status application. It is doubtful that such an application would have been denied. Instead, however, Mr. Placeres failed to appear without explanation for two scheduled court appearances and failed to make any application for relief, even Mr. Borges was clearly eligible.

Then, having failed to appear, Mr. Placeres (through Ms. Ivan) advised Mr. Borges that he should not appear either. In fact, the advice given to Mr. Borges was that if he went to the Immigration Court he would be ordered deported, but that if he didn't go he would not be ordered deported.

When Mr. Borges realized, in April 1998, that an *in abstentia* order had been entered against him, he immediately contacted Mr. Placeres through Entra America, who then filed a woefully inadequate and bizarre "Motion to Reopen to Reconsider" the deportation order. Not only is there no such thing as a "Motion to Reopen to Reconsider" but the stated basis for seeking to reopen the Order of Deportation – that a Motion for a Change of Venue had been filed – is devoid of any legal meaning, much less persuasive value. The failure of Mr. Placeres to refer to the pending Adjustment application, on which he was counsel of record, is incomprehensible. It is, again, a total failure on the part of Mr. Placeres to alert the court to an avenue of relief from deportation available to Mr. Borges. The fact that Mr. Placeres was at the same time representing Mr. Borges on that avenue of relief – his Adjustment Application – makes his failure to base the Motion to Reopen in this all the more inexplicable.

On or about June of 1998, the Immigration Court denied the "Motion to Reopen to Reconsider" and the decision was mailed to Mr. Placeres and District Counsel – not to Mr. Borges. Mr. Placeres failed to advise Mr. Borges that the Motion to Reopen had been denied, and accordingly Mr. Borges was unaware that there was an outstanding Order of Deportation until almost two years later. This failure to inform Mr. Borges that he was still the subject of an outstanding Order of Deportation was inexcusable, grossly negligent and irresponsible in the extreme.

This pattern of incompetent representation continued through Mr. Borges' representation by Mr. Jbara. Mr. Jbara ought to have known immediately upon assuming the file from his predecessor that there was an outstanding Order of Deportation in effect, to have immediately brought this to Mr. Borges' attention, and then to have advised him of any possible avenues of relief. Mr. Jbara did neither. Furthermore, Mr. Jbara led Mr. Borges to unknowingly and unintentionally mislead the immigration office who conducted the adjustment interview. It was only when Mr. Borges sought advice from Mr. Jbara about the efficacy of traveling on a mere stamp in his passport that Mr. Borges was made aware of the existence of the outstanding Order of Deportation.

While Mr. Jbara attempted some resolution of the matter by informing Mr. Borges of the situation and at least proposing some set to rectify it, his efforts fell far short of what Mr. Borges deserved in competent representation. First of all, Mr. Jbara failed to advise Mr. Borges that the representation by Mr. Placeres was ineffective, and that the only way to remedy his current unfortunate legal situation was to raise a claim of in effective assistance of counsel. Second (separate but related), Mr. Jbara failed to advise Mr. Borges that he had a conflict of interest in trying to remedy the current situation which had been created by his predecessor, Mr. Placeres and/or his employer, Entra America, a situation which could only be remedied by raising a claim of ineffective assistance of counsel. Third, Mr. Jbara failed to adequately protect Mr. Borges' legal interests by failing to raise a claim of ineffective assistance in his proposed Motion to Reopen, in failing to pursue the proposed joint motion with the office of the District Counsel, and in failing to file it with the Court.

An alien claiming ineffective assistance carries the burden of proving that counsel's ineffectiveness resulted in prejudice or a denial of fundamental fairness, Viaha v. I.N.S., 51 Fed. Appx. 547, 51. Alternatively, ineffective assistance of counsel exists where "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case" Bernal-Vallejo v. I.N.S., 195 F.3d 56, 63 (1st Cir., 1999).

Prejudice is shown by alleging facts that permit the court to infer that competent counsel would have acted otherwise, Tanijuchi v. Schultz, 303 F.3d 950 (9th Cir. 2002); Mohsseni Dehdahani v. I.N.S., 769 F.2d 249, 250-251 (9th Cir., 1986).[2] In addition, in immigration proceedings, an alien must show eligibility for the relief sought, United States v. LaPlante, 57 F.3d 252, 253 (2nd Cir., 1995) which need only be "plausible grounds for relief from deportation", Doty v. I.N.S., 7 Fed. Appx. 727 (9th Cir. 2001) and also comply with Matter of Lozada 19 I.&N. Dec. 637 (BIA 1988).

The BIA has held that advice from an attorney not to show up to an Immigration Court hearing constitutes ineffective assistance of counsel, In re Grijalva-Barrera, 21 I.&N. Dec. 472 (BIA, 1996) ("The level of incompetence involved in this case establishes that the respondent's absence

[2] It has, however, been held that prejudice need not be shown in a claim of ineffective assistance in an *In absentia* order, In re Grijalva-Barrera, 21 I.& N. Dec. 7 472, 473, N.2

was the result of exceptional circumstances . . . **respondent, who had no reason not to rely on his counsel at this juncture, was blatantly misled regarding his need to appear at the scheduled hearing**", id., 474 (emphasis added)). Thus, Mr. Borges has clearly shown that the conduct of his attorney in advising him not to show up to Immigration Court on February 3, 1998, constituted ineffective assistance of counsel.

Additionally, the failure of Mr. Placeres to appear in court on Mr. Borges' behalf, to advise the Immigration Court of Mr. Borges' eligibility of relief from removal by virtue of his marriage to a U.S. citizen, and his failure to state a basis on which a Motion to Reopen could be granted, clearly shows that Mr. Borges was denied the opportunity to present his case, and that he was denied "fundamental fairness" in the proceedings, Vernal-Vallejo, id., 195 F.3d 63.

The subsequent failure of Mr. Jbara to advise Mr. Borges that he could (and should) have raised a claim of ineffective assistance against Mr. Placeres, and that Mr. Jbara had a conflict of interest (because the ineffective assistance claim was (and remains) the only way Mr. Borges could seek to reopen his case), continued this denial of fundamental fairness and opportunity to present his case, id.

In addition, the failure of Mr. Jbara to raise an ineffective assistance claim in his proposed motion submitted to the office of District Counsel, as well as his failure to disclose a conflict of interest, is also ineffective assistance under these circumstances. In an ineffective assistance claim based on an asserted conflict of interest, the movant must show a conflict of interest which adversely affected his lawyer's performance, U.S. v. Morel, 220 F.3d 65, 69 (2nd Cir. 2000); Cuyler v. Fulman, 446 U.S. 335, 348, 1000 F.Ct. 1708, 64 L.Ed. 2nd 333 (1980).

In the case at bar, Mr. Jbara practiced from the same office – Entra America – whose ineffective and incompetent representation led to the entry of the *in absentia* order. The only way Mr. Borges could have sought to reopen this Order was to attack the effectiveness of earlier counsel. As he was clearly unable to do so, and also unable to advice Mr. Borges to do so, his performance was therefore adversely affected, to Mr. Borges' detriment. Mr. Jbara was further constrained by his loyalty to his own office from raising the issue of fraud with Mr. Borges. Mr. Jbara's representation of Mr. Borges was therefore so completely riddled with conflict which impaired his performance that his representation of Mr. Borges constitutes ineffective assistance as a matter of law.

Mr. Borges has complied with the requirements of Matter of Lozada for raising a claim of ineffective assistance of counsel. Mr. Borges has sworn an affidavit, setting forth the exact nature of the services to be rendered to him by Mr. Placeres and by Mr. Jbara. Mr. Borges is filing a copy of that affidavit with this motion. He has served a copy of that affidavit on both of his prior attorneys at their addresses of record (Exhibit ?), and he has filed a copy of that affidavit with the appropriate disciplinary body in New York (Exhibit ?).

Mr. Borges has thus shown, unequivocally, that representation by his former attorneys was ineffective assistance of counsel, which constitutes "exceptional circumstances" within the meaning of 8 C.F.R. §3.23(b)(4)(ii).

2. The Tolling of the 180-day Period Because of the Fraud of Mr. Borges' Prior Counsel.

The 180-day period in which an alien can apply to reopen an *in abstentia* Order of Deportation is generally treated as a strictly construed statute of limitation, and no exceptions can be read into its plain language. Like every federal statute of limitations, however, it is subject to equitable tolling in cases involving fraud. "Where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered" Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946). This equitable doctrine is read into every federal statute of limitations, id., 327 U.S. 397, Federal Election Commission v. Williams, 104 F.3d 327, 5240 (9th Cir., 1996), including the 180-day limit for filing a motion to reopen an *in abstentia* order, Lopez v. I.N.S., 184 F.3d 1097, 1100 (9th Cir. 1999).

In the case at bar, it is submitte that the representation of Mr. Borges by Mr. Placeres and/or Entra America was fraudulent. It should be patently obvious to any experienced legal practitioner that in fact, Mr. Borges was never represented by Mr. Placeres but instead that Ms. Ivan, through Entra American, fraudulently claimed to be providing the services of an attorney (Mr. Placeres) which were never, in fact, provided. A review of the contents of the legal papers allegedly prepared by Mr. Placeres filed with the Immigration Court, taken in conjunction with the fact that Mr. Borges never met with Mr. Placeres, was never able to speak with him by telephone, and the fact that he never appeared at any of the two Immigration Court hearings held after he filed a Notice of Appearance at Immigration Court on Mr. Borges' behalf.[3] The failure of Entra America to immediately inform Mr. Borges that the 1998 "Motion to Reopen to Reconsider" had been denied was further fraud.

In the only other immigration proceeding known to this attorney wherein Entra America and/or Adela Ivan entered an appearance, Matter of Striano Contracting Corporation, BALCA Case No. 94-INA-509, November 1996, the ALJ found in a labor certification application, that Entra America, acting on behalf of the proposed employer, had contacted prospective employees and explicitly and intentionally discouraged them from applying for the advertised position. This is further proof that Entra America has previously engaged in, at the very least, highly questionable behavior within the immigration context.

It is not alleged that Mr. Jbara himself engaged in any type of fraud. However, he certainly kept Mr. Borges unaware of the existence of the fraud of Ms. Ivan, and also deliberately failed to immediately advise Mr. Borges that the first Motion to Reopen had not been granted, or that the second Motion to Reopen had not been filed.

The 180-day period therefore did not begin to run until Mr. Borges became aware of the fraud Lopez v. INS, id 184 F. 3d 1100. I retrieved Mr. Borges' file from Mr. Jbara in mid-June 2002. However, it was not until some months later, on or about September 10, 2002, that the undersigned attorney discovered from the New York State Office of Court Administration that Mr. Placeres had never been listed at either the Entra America offices or at the P.O. Box address used on the papers filed with the I.N.S. and the Immigration Court. Further research revealed that Entra America was not an entity authorized to practice before either the Executive Office for Immigration Review or the

[3] It is well settled that there is no limited appearance of counsel in Immigration Court proceedings, Cite, and the fact that a G-28 form rather than an EOIR-28 was filed is further proof that there was no proper legal representation of Mr. Borges at the Immigration Court

I.N.S. At that point I then spoke with Mr. Borges in further detail about his communication with his former attorneys, and he advised me that in fact he had never seen, met with nor spoken with Mr. Placeres, and he was still under the impression that a Motion to Reopen his case was still pending. Applying the 180-day limit from that day forward, Mr. Borges' 180-day period expires on or about March 4, 2003.

Since the date of his first meeting with Entra America, Mr. Borges has acted with reasonable diligence in pursuing his immigration case. The annexed phone records show that Mr. Borges has called Mr. Jbara regularly and consistently to inquire about the status of his case over the last two years. He has been diligent and zealous in trying to resolve his immigration dilemma. As he states, he is now in the worst position – far worse – for having hired Entra America to represent him than if he had proceeded *pro se.*

CONCLUSION

Mr. Borges is within the 180-day period for filing a Motion to Reopen, and has shown exceptional circumstances to warrant a reopening, and eligibility for relief warranting vacatur of the *in abstentia* Order of Deportation.

Mr. Borges is in a bona fide marriage to a U.S. citizen. An I-130 has already been approved, after a thorough interview by an I.N.S. officer. Mr. Borges is therefore eligible for Adjustment of Status pursuant to 8 C.F.R. §240.11(a)(i). It is therefore requested that the Order of Deportation be vacated and the Mr. Borges' status be adjusted to that of permanent resident *nunc pro tunc*, to March 1998, or in the alternative that proceedings be terminated so that Mr. Borges can apply for adjustment of status to the district director.

Dated: New York, New York
January 7, 2003

Paul O'Dwyer
Attorney for Respondent
134 West 26 Street, Suite 902
New York NY 10001
(646) 230-7444

80000 SERIES
30% P.C.W.

UNITED STATES BANKRUPTCY COURT
Eastern District of New York

NOTE: All documents filed in this matter must be identified by both adversary and bankruptcy case numbers, case chapter and judge's initials.

In re: Jamal Jbara

Bankruptcy Case No.: 1-09-48496-dem

Jose Borges

Plaintiff(s),

-against-

Jamal Jbara

Adversary Proceeding No. 1-10-01004-dem

Defendant(s)

SUPPLEMENTAL SUMMONS AND NOTICE OF PRETRIAL CONFERENCE IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the complaint within 35 days.

Address of Clerk:	**United States Bankruptcy Court** **271 Cadman Plaza East, Suite 1595** **Brooklyn, NY 11201-1800**

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Name and Address of Plaintiff's Attorney:	**Paul O'Dwyer** **134 West 26th Street** **Suite 902** **New York, NY 10001**

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

YOU ARE NOTIFIED that a pretrial conference of the proceeding commenced by the filing of the complaint will be held at the following time and place.

Location:	**Date and Time:**
United States Bankruptcy Court, 271 Cadman Plaza East, Courtroom 3577 - 3rd Floor, Brooklyn, NY 11201-1800	**April 6, 2010 at 02:00 PM**

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

Dated: February 19, 2010

Robert A. Gavin, Jr., Clerk of the Court

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re: Jamal Jbara, Debtor	)	
	)	Case No. 1-09-48496-dem
	)	Chapter 7
Address: 42-22 194th Street 2nd Floor Flushing, NY 11358	)	
SSN: xxx-xx-7159	)	

COMPLAINT TO DETERMINE DISCHARGEABILITY OF CERTAIN DEBT

~~PLEASE TAKE NOTICE that Paul O'Dwyer, Esq., a creditor in the above bankruptcy~~ petition~~, will move this Court before the Honorable Dennis E. Milton, United States Bankruptcy~~ Judge~~, Court Room 3577, at 271 Cadman Plaza East, Brooklyn, New York, on February 2, 2010 at 2 p.m. or soon thereafter, for a hearing to determine dischargeability of debtor's debt owed to~~ creditor ~~Paul O'Dwyer. Creditor will rely in the attached brief and exhibits in support of his complaint.~~ 6-N

Dated: New York, New York
January 4, 2010

Respectfully submitted,

PAUL O'DWYER, ESQ.
Creditor

To: Jamal Jbara
42-22 194th Street
2nd Floor
Flushing, NY 11358

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re: Jamal Jbara, Debtor	)
	) Case No. 1-09-48496-dem
	) Chapter 7
Address: 42-22 194th Street, 2nd Floor, Flushing, NY 11358	)
SSN: xxx-xx-7159	)

CREDITOR'S SUPPORTING BRIEF TO COMPLAINT TO DETERMINE DISCHARGEABILITY OF CERTAIN DEBT

I, Paul O'Dwyer, under penalty of perjury, affirm that:

1. I am the attorney for Jose Borges, who is the Plaintiff in a pending civil action against Jamal Jbara, captioned Borges v. Entra America, Ivan, Jbara and Placeres, New York City Civil Court, Index No. 530 TSN 2004. The Complaint was filed on August 3, 2004, and Mr. Jbara has appeared in the action, answered, and filed two motions for summary judgement, each of which has been denied.

2. The complaint asserts causes of action for negligence, breach of contract, legal malpractice, negligent and intentional infliction of emotional distress, fraud, breach of fiduciary duty, and a breach of New York Judiciary Law § 487 (prohibiting deceit of a party by an attorney regarding the status of his case) and seeks statutory and treble damages. An amended complaint was later filed, which adds additional facts and asserts the same causes of action.

3. With regard to Mr. Jbara, the complaint alleges in essence, that he failed to properly advise Mr. Borges regarding his immigration status, that he deliberately and intentionally

gave him false and misleading information about the status of his immigration case. Specifically, he alleges that Jbara lied to him about his eligibility for adjustment of status, and told him that he was not subject to an *in absentia* removal order, when in fact Jbara knew that he was. The complaint also alleges that Jbara counseled Mr. Borges to tell an immigration official that he was not subject to this removal (or deportation) order, when in fact Jbara knew that Borges was subject to this order. It also alleges that Jbara lied to Borges by stating that he (Jbara) had filed a motion to reopen the *in absentia* removal (deportation) order, when in fact he had not done so, that lied to Mr. Borges about who he was employed by, so that Mr. Borges believed Jbara worked for an immigration law firm when in fact he was a self-employed attorney with no experience in immigration law. The complaint further alleges that Jbara conspired with the other Defendants in that action to give false and misleading information to Mr. Borges, to cover up the wrongdoing of each other.

4. Successive summary judgment motions filed by Jbara have been denied on the basis that the case presents controverted issues of fact which cannot be resolved via summary judgment procedures.

5. Pursuant to the Bankruptcy Code, a discharge may not be granted for fraud or defalcation while acting in a fiduciary capacity. 11 U.S.C. § 523(a)(4). Attorney-client relationships establish a fiduciary relationship within the meaning of § 523(a)(4), Andy Warhol Foundation for Visual Arts v. Hayes, 183 F.3d 162, 34 BCD 976 (2nd Cir. 1999); this extends to all aspects of the attorney client relationship, including, but not limited to, fee agreements. id., 183 F.3d 170.

6. In this case, the allegations against Jbara in the Complaint and First Amended Complaint

support the various causes of action for negligence, breach of contract, malpractice, breach of fiduciary duty and fraud. Jbara has denied these allegations in the state court action and presumably will do so in this proceeding also. It thus seems that a hearing should be held to determine dischargeability of Mr. Borges' claims against Jbara. Alternatively, and more efficiently, the issue should be postponed until after the trial in that action, on which jury selection is scheduled for January 26, 2010.

Dated: New York, New York
January 4, 2010

Paul O'Dwyer, Esq.

UNITED STATES BANKRUPTCY COURT
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Dated: February 19, 2010

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	)	Chapter 7
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January 4, 2010

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PAUL O'DWYER, ESQ.
Creditor

To: Jamal Jbara
42-22 194th Street
2nd Floor
Flushing, NY 11358

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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